Superintendent of Lands & Surveys Samarahan Division Jalan Dato Mohd Musa & Ors v Nikodemus ak Singai & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–418–10 OF 2014
HANIPAH FARIKULLAH, RAVINTHRAN AND GHAZALI CHA JJCA
19 MAY 2022

Native Law and Custom — Land dispute — Customary rights over land — Federal Court remitted case to determine claim on territorial domain — Whether native customary rights of pemakai menoa and pulau galau in the area of interest proven — Whether order recognising 300 hectares of temuda land should be varied — Sarawak Land Code s 6A

This case was remitted by the Federal Court to the Court of Appeal to determine the territorial domain of the natives. The first, second and third plaintiffs ('the respondents') belonged to the Iban ethnic group in Sarawak. They filed an action on behalf of themselves and their native community to claim native customary rights over land around Kampung Spaoh, Kampung Menat Ulu and Kampung Menat Illi in Gedong in the Simunjan District. They asserted native customary rights of land including *pemakai menoa* (territorial domain that included foraging area), *pulau galau* (forest that was reserved for community use) and *temuda* (land that was cultivated) on 8,001 hectares of land known as area of interest in map 'M'. The fourth, fifth and sixth defendants ('the appellants') were the superintendents of lands and surveys, Samarahan Division, the Director of Forests Sarawak and the Government of Sarawak respectively. The respondents pleaded that the governmental defendants had impaired their native customary rights over the area of interest in map 'M' by granting a logging permit to the first defendant and provisional leases to the second and third defendants. The first, second and third defendants were struck out from the suit before the commencement of the trial in the High Court. The appellants disputed the claim of the respondents which was based on native customary rights. They also pleaded that part of the area of interest fell within the Ensegei Forest Reserve which was constituted in 1964. The High Court found that the respondents had proved *pemakai menoa* and *pulau galau* in the entire area of interest marked in map 'M' and recognised 300 hectares of the land as *temuda* land. Thus, the High Court found that the claim based on territorial domain (*pemakai menoa*) under customary law had been proved over land measuring 8,001 hectares. By then, the land in question had been alienated to the second and third defendants who had been struck out from the suit and whose titles to the land were indefeasible. Therefore, the High Court judge made an order for general damages to be assessed in favour of the respondents for the loss of the disputed lands. At the time of the appeal

by the appellants, the Federal Court had issued a landmark decision in the case of *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281. In view of the apex court's decision, the Court of Appeal held that the respondents had no basis to claim for the loss of the *pemakai menoa* and *pulau galau* measured 8,001 hectares on map 'M'. However, the finding of the High Court that the respondents were entitled to 300 hectares of *temuda* land was upheld. Aggrieved by the decision, the respondents appealed to the Federal Court. In 2018, the Sarawak State Legislative Assembly had introduced s 6A to the Sarawak Land Code which came into force on 1 August 2019. The amendment recognised the existence of *pemakai menoa* or territorial domain in Sarawak. Subsequently, the Federal Court held that the aforementioned landmark decision in respect of *pemakai menoa* and *pulau galau* had been overturned and the respondents' claims were not caught by sub-s (6) of s 6A as there was no final decision before the coming into force of the amendment. The case was then remitted back to the Court of Appeal. The issues for consideration were: (a) whether the respondents had proved their native customary rights of *pemakai menoa* and *pulau galau* in the area of interest; and (b) whether the order recognising the 300 hectares of *temuda* land should be varied.

Held:

(1) The learned High Court judge not only made specific reference to the evidence that supported the claim on *temuda* land but also referred to the evidence of traditional activities in the entire area claimed as the *pemakai menoa* of the respondents. The evidence of the large cultivation mosaic measuring 300 hectares in the middle of map 'M' and the other evidence of traditional activity in and around settlements in the area of interest were carefully considered by the learned High Court judge. The traditional activity included not only agriculture but also hunting and foraging of nearby forest for food and other necessities. There were also evidence of old longhouse sites and burial grounds which proved historical occupation in the larger area beyond the confines of the present-day settlements. Furthermore, the High Court accepted the evidence of the witnesses and their narration of the oral history of their ancestors who had settled in the area. Since the finding of fact by the High Court was not overturned by the previous panel of the Court of Appeal, the court affirmed the High Court's finding that the respondents proved the existence of *pemakai menoa* in the area of interest in map 'M' (see paras 16 & 18).

(2) The court was not at liberty to examine the merits of whether the *pemakai menoa* claim before the court was legally sustainable as the Federal Court had remitted this case with a specific direction to determine the location

and size of the *pemakai menoa* under s 6A. The court noted earlier that the learned High Court judge had, after assessing all the evidence tendered in this case, found that the respondents had proven *pemakai menoa* over the area of interest measuring 8,001 acres. In the premises, the court ruled that the respondents were entitled to compensation based on the larger area under s 6A which was 1,000 hectares (see paras 20–21).

(3) The Federal Court, after finding that *pemakai menoa* has been given statutory recognition under s 6A of the Sarawak Land Code, opined that the location of the area of 500 hectares or 1,000 hectares of *pemakai menoa* in the area of interest of 8,001 hectares in map 'M' would be relevant for the purpose of compensation. The high court had made a finding that the entire area of interest of 8,001 hectares constituted the *pemakai menoa* of the respondents. Furthermore, the respondents were not seeking possession over any part of the area but only claiming compensation in accordance with the judgment of the High Court. Both counsels for the parties agreed that it was not necessary to determine the location of the limited *pemakai menoa* as the claim was for compensation only. In view of the agreement of the parties, the exact location of the area of *pemakai menoa* became a non-issue. Compensation may be calculated in proportion to the area of *pemakai menoa* and *temuda* land that the respondents were entitled to (see paras 22–23).

(4) The respondents did not file a cross appeal against the decision of the High Court that they were only entitled to 300 hectares. They were content with the decision of the High Court. In the premises, there was no live issue in respect of the size of the *temuda* land. It was 300 hectares as found by the High Court and affirmed by the previous panel of the Court of Appeal (see para 25).

[Bahasa Malaysia summary

Kes ini telah dikembalikan oleh Mahkamah Persekutuan ke Mahkamah Rayuan untuk menentukan domain wilayah orang asli. Plaintif pertama, kedua dan ketiga ('responden-responden') adalah terdiri daripada etnik Iban di Sarawak. Responden-responden memfailkan tindakan bagi pihak mereka dan masyarakat asal untuk menuntut hak adat orang asli ke atas tanah di sekitar Kampung Spaoh, Kampung Menat Ulu dan Kampung Menat Illi di Gedong di daerah Simunjan. Mereka menegaskan hak tanah adat asli termasuk *pemakai menoa* (domain wilayah yang merangkumi kawasan mencari makan), *pulau galau* (hutan yang dikhaskan untuk kegunaan masyarakat) dan *temuda* (tanah yang diusahakan) di atas tanah seluas 8,001 hektar yang dikenali sebagai kawasan kepentingan dalam peta 'M'. Defendan keempat, kelima dan keenam ('perayu-perayu') adalah penguasa tanah dan ukur, Bahagian Samarahan, Pengarah Hutan Sarawak dan Kerajaan Sarawak. Responden-responden merayu bahawa defendan kerajaan telah menjejaskan hak adat asal mereka ke atas kawasan kepentingan dalam peta 'M' dengan memberikan permit

pembalakan kepada defendan pertama dan pajakan sementara kepada defendan kedua dan ketiga. Defendan pertama, kedua dan ketiga telah dibatalkan daripada saman itu sebelum permulaan perbicaraan di Mahkamah Tinggi. Perayu-perayu mempertikaikan tuntutan responden-responden yang berdasarkan hak adat anak negeri. Mereka juga merayu bahawa sebahagian daripada kawasan kepentingan itu adalah termasuk dalam Hutan Simpan Ensegei yang ditubuhkan pada tahun 1964. Mahkamah Tinggi mendapati responden-responden telah membuktikan *pemakai menoa* dan *pulau galau* di seluruh kawasan kepentingan yang ditanda dalam peta 'M' dan mengiktiraf 300 hektar tanah itu sebagai tanah *temuda*. Justeru, Mahkamah Tinggi mendapati tuntutan berdasarkan domain wilayah (*pemakai menoa*) di bawah undang-undang adat telah dibuktikan ke atas tanah seluas 8,001 hektar. Pada masa itu, tanah berkenaan telah diberi milik kepada defendan kedua dan ketiga yang telah dibatalkan daripada saman itu dan hak miliknya terhadap tanah itu tidak boleh dicabar. Oleh itu, hakim Mahkamah Tinggi membuat perintah agar ganti rugi am dinilai memihak kepada responden-responden atas kehilangan tanah yang dipertikaikan. Pada masa rayuan oleh perayu-perayu, Mahkamah Persekutuan telah mengeluarkan keputusan penting dalam kes *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281. Berdasarkan kes landmark tersebut, Mahkamah Rayuan memutuskan bahawa responden-responden tidak mempunyai asas untuk menuntut kehilangan *pemakai menoa* dan *pulau galau* berkeluasan 8,001 hektar pada peta 'M'. Walau bagaimanapun, keputusan Mahkamah Tinggi bahawa responden-responden berhak mendapatkan 300 hektar tanah *temuda* dikekalkan. Terkilan dengan keputusan itu, responden-responden membuat rayuan ke Mahkamah Persekutuan. Pada 2018, Dewan Undangan Negeri Sarawak telah memperkenalkan s 6A Kanun Tanah Sarawak yang berkuat kuasa pada 1 Ogos 2019. Pindaan itu mengiktiraf kewujudan *pemakai menoa* atau domain wilayah di Sarawak. Mahkamah Persekutuan kemudian memutuskan bahawa keputusan *landmark* yang disebut di atas berkenaan *pemakai menoa* dan *pulau galau* telah dibatalkan dan tuntutan responden-responden tidak ditangkap oleh sub-s (6) s 6A kerana tiada keputusan muktamad sebelum masuk ke dalam kuat kuasa pindaan. Kes itu kemudiannya diremit semula ke Mahkamah Rayuan. Isu-isu yang perlu dipertimbangkan ialah: (a) sama ada responden-responden telah membuktikan hak adat asal mereka di *pemakai menoa* dan *pulau galau* di kawasan yang berkepentingan tersebut; dan (b) sama ada perintah mengiktiraf 300 hektar tanah *temuda* perlu diubah.

Diputuskan:

(1) Hakim Mahkamah Tinggi yang arif bukan sahaja membuat rujukan khusus kepada keterangan yang menyokong tuntutan ke atas tanah

temuda tetapi juga merujuk kepada keterangan kegiatan tradisi di seluruh kawasan yang didakwa sebagai *pemakai menoa* oleh responden-responden. Bukti mozek penanaman besar berkeluasan 300 hektar di tengah peta 'M' dan bukti lain aktiviti tradisional di dalam dan sekitar penempatan di kawasan yang berkepentingan telah dipertimbangkan dengan teliti oleh hakim Mahkamah Tinggi yang arif. Aktiviti tradisional itu bukan sahaja melibatkan pertanian tetapi juga memburu dan mencari makan di hutan berhampiran untuk makanan dan keperluan lain. Terdapat juga bukti tapak rumah panjang lama dan tanah perkuburan yang membuktikan pendudukan bersejarah di kawasan yang lebih besar di luar batasan penempatan masa kini. Tambahan pula, Mahkamah Tinggi menerima keterangan saksi dan penceritaan mereka tentang sejarah lisan nenek moyang mereka yang telah menetap di kawasan itu. Memandangkan dapatan fakta oleh Mahkamah Tinggi tidak dibatalkan oleh panel Mahkamah Rayuan sebelum ini, mahkamah mengesahkan dapatan Mahkamah Tinggi bahawa responden-responden membuktikan kewujudan *pemakai menoa* di kawasan kepentingan dalam peta 'M' (lihat perenggan 16 & 18).

(2) Mahkamah tidak mempunyai kebebasan untuk meneliti merit sama ada tuntutan *pemakai menoa* di hadapan mahkamah adalah mampan di sisi undang-undang kerana Mahkamah Persekutuan telah meremitkan kes ini dengan arahan khusus untuk menentukan lokasi dan saiz *pemakai menoa* di bawah s 6A. Mahkamah menyatakan sebelum ini bahawa hakim Mahkamah Tinggi yang arif telah, selepas menilai semua keterangan yang dikemukakan dalam kes ini, mendapati bahawa responden-responden telah membuktikan *pemakai menoa* ke atas kawasan kepentingan seluas 8,001 ekar. Di dalam premis itu, mahkamah memutuskan bahawa responden-responden berhak mendapat pampasan berdasarkan kawasan yang lebih besar di bawah s 6A iaitu 1,000 hektar (lihat perenggan 20–21).

(3) Mahkamah Persekutuan, selepas mendapati *pemakai menoa* telah diberi pengiktirafan statutori di bawah s 6A Kanun Tanah Sarawak, berpendapat bahawa lokasi kawasan seluas 500 hektar atau 1,000 hektar *pemakai menoa* di kawasan berkepentingan 8,001 hektar. dalam peta 'M' akan menjadi relevan untuk tujuan pampasan. Mahkamah Tinggi telah membuat keputusan bahawa keseluruhan kawasan berkepentingan seluas 8,001 hektar merupakan *pemakai menoa* responden-responden. Tambahan pula, responden-responden tidak memohon pemilikan ke atas mana-mana bahagian kawasan itu tetapi hanya menuntut pampasan mengikut penghakiman Mahkamah Tinggi. Kedua-dua peguam bagi pihak bersetuju bahawa tidak perlu menentukan lokasi *pemakai menoa* terhad kerana tuntutan adalah untuk pampasan sahaja. Memandangkan persetujuan pihak-pihak, lokasi sebenar kawasan *pemakai menoa* menjadi bukan isu. Pampasan boleh dikira mengikut perkadaran keluasan

pemakai menoa dan tanah *temuda* yang responden-responden berhak (lihat perenggan 22–23).

(4) Responden-responden tidak memfailkan rayuan balas terhadap keputusan Mahkamah Tinggi bahawa mereka hanya berhak mendapat 300 hektar. berpuas hati dengan keputusan Mahkamah Tinggi. Di dalam premis itu, tiada isu langsung berhubung keluasan tanah *temuda*. Ia adalah 300 hektar seperti yang ditentukan oleh Mahkamah Tinggi dan disahkan oleh panel Mahkamah Rayuan sebelum ini (lihat perenggan 25).]

Cases referred to

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281, FC (refd)

Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241; [2001] 2 CLJ 769, HC (refd)

Legislation referred to

Land Code (Cap 81) s 6A, 6A(6)

Editorial Note: This case was remitted from the Federal Court Civil Appeal No 01(F)-32–10 of 2019(Q) and Civil Application No 08(F)-363–08 of 2017(Q) (Federal Court, Putrajaya)

Mohd Adzrul bin Adzlan (with Nur Azhar bin Bujang) (Sarawak State Attorney-General's Chambers) for the appellant.

Ng Kim Ho (with Berrylin Ng Phuay Lee) (Dominique & Assoc) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] The instant appeal came before the Federal Court recently. The main issue was whether natives could claim territorial domain. The Court of Appeal had earlier ruled against the natives. The Federal Court allowed the appeal and has remitted it to this panel of the Court of Appeal to decide on the location of the territorial domain and to determine whether the extent of the territorial domain is 500 hectares or 1,000 hectares. This decision was made in view of the amendment to the Sarawak Land Code (Cap 81) that gave statutory recognition to the territorial domain of natives in the new s 6A. But first, we shall summarize the background facts of the claim. We shall also point out the changes in the law since the action was filed in 2007.

A BACKGROUND FACTS

[2] For ease of reference and to avoid confusion as the case had been remitted from the Federal Court, we shall refer to the parties as plaintiffs and defendants. The three plaintiffs belong to the Iban ethnic group in Sarawak. B They filed an action on behalf of themselves and their native community to claim native customary rights over land around Kampung Spaoh, Kampung Menat Ulu and Kampung Menat Illi in Gedong in the Simunjan District. They asserted native customary rights over a large area. In map 'M' which was drawn by a community mapper, the area of interest was 8,001 hectares. The claim C included *pemakai menoa* (territorial domain that includes foraging area), *pulau galau* (forest that is reserved for community use) as well as *temuda* (land that was cultivated).

D **[3]** The fourth, fifth and sixth defendants are the Superintendent of Lands and Surveys, Samarahan Division, the Director of Forests, Sarawak and the Government of Sarawak. The plaintiffs pleaded that the governmental defendants had impaired their native customary rights over the area of interest in Map 'M' by granting a logging permit to the first defendant and provisional E leases to the second and third defendants. The first, second and third defendants who were the beneficiaries of the logging permit and provisional leases granted by the government were struck out from the suit before the commencement of the trial. No appeal was filed against this decision by the plaintiffs.

F **[4]** The fourth to sixth defendants disputed the claim of the plaintiffs which based is on native customary rights. They also pleaded that part of the area of interest fell within the Ensegei Forest Reserve which was constituted in 1964.

G DECISION OF HIGH COURT

[5] In respect of the claim for land based on the argument that virgin forest had been cleared and cultivated (the *temuda* claim) before 1 January 1958, the H High Court noted that, based on expert evidence from the plaintiffs as well as the governmental defendants, a cultivation mosaic measuring about 300 hectares can be seen in the area of interest in the aerial photograph taken in 1947. It is located in identical regions in the parties interpretation maps which were based on the said aerial photographs. For this reason, the High I Court recognised the said 300 hectares of land as *temuda* land.

[6] The High Court also found that the plaintiffs had proved *pemakai menoa* and *pulau galau* in the entire area of interest marked in Map 'M' after accepting testimony from the plaintiffs' witnesses. The conclusion is found in

the following paragraph of the High Court judgment as follows:

> From the above testimony, this court finds that the testimony showed that there are customary activities practised by the inhabitants of Kampung Spaoh, even at the time of their ancestors, in the locality of Sungai Ensengei. Thus at the time when the said forest reserve was constituted on 8 December 1961, the plaintiffs' native customary rights were already created and in existence.

[7] Thus, the High Court found that the claim based on territorial domain (*pemakai menoa*) under customary law had been proved over land measuring 8,001 hectares. By then, the land in question had been alienated to the second and third defendants who had been struck out from the suit. Furthermore, the High Court judge who delivered the striking out decision ruled that the second and third defendants' titles to the land are indefeasible. The judge also ruled that the same reasoning applied to the first defendant's logging permit. There was no appeal against this decision. Having regard to that decision, the High Court did not give possession of the *pemakai meno*a land and the *temuda* land in Map 'M' to the plaintiffs. Instead, the court made an order for general damages to be assessed in favour of the plaintiffs for the loss of the disputed lands.

DECISION OF COURT OF APPEAL

[8] The appeal of the fourth to sixth defendants came before the Court of Appeal for the first time on 13 July 2017. By that time, the Federal Court had issued a landmark decision in the case of *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281. In that case, the Federal Court held that the customary practice of creating *pemakai menoa* and *pulau galau* for sustenance has no force of law. In view of the apex court's decision, the Court of Appeal held that the plaintiff had no basis to claim for the loss of the *pemakai menoa* and *pulau galau* that measured 8,001 hectares on Map 'M'. Thus, the appeal was allowed against this part of the decision of the High Court. But the Court of Appeal upheld the finding of the High Court that the plaintiffs were entitled to 300 hectares of land on the basis that it is *temuda* land as represented by the cultivation mosaic on Map 'M'. Aggrieved by this decision, the plaintiffs appealed to the Federal Court.

DECISION OF FEDERAL COURT

[9] There was again some alteration to the legal landscape in relation to native customary rights over land in Sarawak when the appeal came before the

Federal Court for decision on 24 November 2021. In 2018, the Sarawak State Legislative Assembly (Dewan Undangan Negeri Sarawak), in response to the decision of the Federal Court in *Director of Forest & Anor v TR Sandah ak Tabau & Ors* introduced s 6A to the Sarawak Land Code (Cap 81). It came into force on 1 August 2019. The amendment recognised the existence of *pemakai menoa* or territorial domain in Sarawak. But it provided a statutory mechanism for the assertion of a claim based on it. The full provision reads as follows:

> 6A Native territorial domain
>
> (1) Any native community may, within a native territorial domain, claim usufructuary rights exercised and enjoyed by members of that community.
>
> (2) Any claim under subsection (1) shall be made to the Superintendent in such form as may be provided by the Director with all evidence in support of such claim:
>
> Provided that —
>
> (a) any area claimed as native territorial domain shall not exceed five hundred hectares; or
>
> (b) the Minister may, with the approval of the Majlis Mesyuarat Kerajaan Negeri in accordance with the Rules made herein, allow a claim of up to one thousand hectares.
>
> (3) If the Director approves the claim, the Superintendent shall issue a native communal title, describing the area as a native territorial domain, which shall be used exclusively by the native community for agricultural purpose or such other purposes as may be approved by the Majlis Mesyuarat Kerajaan Negeri and subject to any other terms and conditions that the Director may impose:
>
> Provided that the native communal title shall —
>
> (a) be issued in the name of a person or body of persons who shall hold the native territorial domain in trust for the native community named in the native communal title in accordance with rules made hereunder;
>
> (b) be in perpetuity, free of any premium, rent or other charges; and
>
> (c) not be assigned or transferred to any person who is not a member of the native community named therein.
>
> (4) In the event that the Director rejects the claim, any person aggrieved by his decision may within thirty days from the date when the decision of the Director is conveyed to him, appeal to the Minister who shall consider the appeal.
>
> (5) Where any question shall arise as to whether any person is a member of the native community named in the native communal title issued under subsection (3), the person or body of persons in whose name the native communal title is issued shall refer the same to the District Native Court for a decision, and such reference shall be instituted and dealt with in accordance with rules made under the Native Courts Ordinance, 1992 [Ord No 9/92].
>
> (6) Any claim for a native territorial domain shall not be made or allowed in respect of any area or land where, before the coming into force of this section, there is a final

decision by a court of competent jurisdiction that no usufructuary rights have subsisted or have been lost or abandoned by members of the native community making that claim. [Add Cap A179]

[10] It must be noted that a claim for Native Territorial Domain (NTD) may be made to the Superintendent. The area claimed may not exceed 500 hectares but the Minister may approve a claim up to 1,000 hectares.

[11] The Federal Court held that the decision in *Director of Forest & anor v TR Sandah ak Tabau & Ors* in respect of *pemakai menoa* and *pulau galau* had been overturned and that the said decision was good law only until 31 July 2019. It further held that the plaintiffs' claim in this case was not caught by sub-s (6) of s 6A as there was no final decision before the coming into force of the amendment. The Federal Court then gave some directions when remitting the case to this panel for further consideration. They are captured in the following paragraphs of the judgment:

> [162] Upon our due perusal of the grounds of judgment of the Court of Appeal, we found that there was no assessment made on the finding of facts, such that the severance of 300 hectares of *Temuda* from the claimed 8,001 hectares was based on *TR Sandah 1*. As stated earlier, the Court of Appeal was right then to make such an order based on the then prevailing ruling of *TR Sandah 1*.
>
> [163] However, with the coming into force of s 6A, we are of the view that *this appeal ought to be sent back to the Court of Appeal for a finding of fact specifically on the area where Pemakai Menoa and Pulau Galau are situated within the 8,001 hectares considering a maximum of 500 hectares or 1,000 hectares of Pemakai Menoa and Pulau Galau accordingly as allowed under s 6A.* Any such finding would be relevant for the purpose of compensation under s 197 of the SLC to the appellants who might have been deprived of their rights by reason of alienation of the lands to third parties. (Emphasis added.)

ISSUES

[12] Upon remission of the appeal to this panel by the Federal Court, during oral argument, counsel for the plaintiffs submitted that there are three issues that require determination:

(a) the location of the territorial domain of either 500 hectares or 1,000 hectares on Map 'M';

(b) whether the size of the territorial domain should be 500 hectares or 1,000 hectares? and

(c) whether the order of the High Court recognising 300 hectares of *temuda* land on the map should be varied and 427 hectares should be recognised as claimed by the plaintiffs?

[13] We find that there is also another issue that requires determination. Counsel for the fourth to sixth defendants argued before us that the plaintiffs had failed to prove *pemakai menoa* and *pulau galau* in the area of interest in Map 'M'. The previous panel of the Court of Appeal found that the 300 hectares of cultivation mosaic in Map 'M' was *temuda* land In respect of the claim for *pemakai menoa* and *pulau galau*, the Court of Appeal only ruled that, as a matter of law, in view of the decision of the Federal Court in *Director of Forest & Anor v TR Sandah ak Tabau & Ors*, a claim based on the customary practice of *pemakai menoa* was not sustainable. The Court of Appeal did not affirm the finding of the High Court that the plaintiffs had proved *pemakai menoa* and *pulau galau* as a matter of fact. The relevant paragraph of the judgment of the Court of Appeal which spoke through Abdul Karim Abdul Jalil JCA reads as follows:

> [13] The critical issue before us having serious implication to the resolution of this appeal was whether the learned High Court judge was right in finding as he did that the respondents had suceeded on a balance of probabilities in proving their claim of NCR over that area of land as alleged and prayed for in their statement of claim. It must lay emphasis that that area of land claimed are specifically pleaded as *temuda, pemakai menoa and pulau* which are land surrounding and /or in close proximity to the respondents' villages. *As alluded to earlier, the area of land consisting of approximately 300 hectares of cultivation mosaic are admitted by both parties to fall within the concept of temuda and therefore allowable as NCR land. What was left to be considered by us was whether that part of the learned High Court judge's decision on pemakai menoa and pulau was sustainable in law.* (Emphasis added.)
>
> [14] On this aspect of the case, we agree with learned counsel for the appellant's submission that the Federal Court decision in *TR Sandah* is a direct binding authority and determinative of the present appeal ...
>
> [17] Based on the clear exposition of the law by the Federal Court in the *TR Sandah*'s case, we agreed totally with learned counsel for the appellant's submission that the respondent cannot claim NCR on the concerned land based on *pemakai menoa and pulau galau.* What the law of Sarawak had recognised in a claim for NCR is the custom or adat of 'Temuda'. Hence, the decision of the learned High Court judge on these pleaded claims was unsustainable and ought to be set aside.

[14] Therefore, the correctness of the factual finding of the High Court that the plaintiffs had proved *pemakai menoa*, quite apart from its size or its location, is still a live issue. In para [162] of the Federal Court's judgment that we reproduced earlier, it was said that 'Upon our due perusal of the grounds of judgment of the Court of Appeal, we found that there was no assessment made on the finding of facts'. In the next paragraph, the Federal Court remitted the case to us to make a finding of fact on the location of the *pemakai menoa* and to determine whether the area is up to a maximum of 500 hectares or 1,000 hectares. In the premises, the first issue should be whether the decision of the High Court that the plaintiffs had proved *pemakai menoa* on the evidence can be affirmed.

FINDING OF PEMAKAI MENOA

[15] Counsel for the fourth to sixth defendants argued that the plaintiffs only succeeded in proving their *temuda* claim to the extent of 300 hectares. They failed to prove the *pemakai menoa* and *pulau galau* claim. This argument is found in the following three paragraphs of the written submission filed for the purpose of this hearing:

> 6.4 The majority of the evidences led and tendered by the Respondents all point to the fact that the lands were primarily used for planting paddy, rubber, coconut and palm trees. The evidences all points to individual usage and ownership of land which bares the characteristic of *temuda* and not that of *Pemakai Menoa* and *Pulau Galau* or Native Territorial Domain which is communal in nature.
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> 6.5 The Respondents during trial called 13 witnesses. Almost all gave evidence in one way or form about paddy, rubber, coconut and palm trees. The High Court decision was also based primarily and heavily based on evidences by these witnesses in relation to coconut or rubber planting schemes as well as planting of paddy.
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> 6.6 Therefore, it is submitted that there is no cogent evidence to prove that the Respondents had in anyway exercise usufructuary rights over areas within or conjoining or immediately adjacent to those areas found cleared by the High Court.

[16] Thus, counsel for the fourth to sixth defendants argued that the High Court only looked at evidence relating to a *temuda* claim. However, as correctly pointed out by counsel for the plaintiffs, this is not true. The plaintiffs' evidence included oral testimony of not only cultivation but of hunting, foraging, the discovery of old gravesites (*pendam*), the presence of old longhouse sites (*tembawai*) and archaeological finds in the area of interest that measured 8,001 hectares in Map 'M'. The learned High Court judge not only made specific reference to the evidence that supports the *temuda* claim but also referred to the evidence of traditional activities in the entire area claimed as the *pemakai menoa* of the plaintiffs. The treatment of this evidence is found in paras [28]–[31] of the High Court's judgment:

> [28] The various locations of the plaintiffs' 'pemakai menoa' were proved through the testimonies of the plaintiffs' oral history. In the present case, the evidence of oral history can be found in the witness statements of:
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> (a) PW3, in paras 4, 5, 6 and 7 of WS-PW3;
>
> (b) PW4, in paras 4, 5, 6 and 7 of WS-PW4;
>
> (c) PW5, in paras 4, 5, 6 and 7 of WS-PW5; and
>
> (d) PW6, in para 4 of WS-PW6.
>
> [29] In so far as to whether the location of the area claimed by the plaintiffs is proved, this court finds as follows. The rivers and streams stated in evidence are Batang Sadong, Sungai Spaoh, Sungai Jawey/Jai, Sungai Menat/Benat, Sungai Setambal, Sungai Empetir, Sungai Peliun, Sungai Sekadang, Sungai Balau, Sungai

Perasa, Sungai Gulau, Sungai Maong, Sungai Nap and Sungai Ensengai. These are the rivers and streams where the plaintiffs claimed that their ancestors once settled and carried out cultivation. The plaintiffs' witnesses have testified that they use *perahus* to reach their farms and gardens, and to their communal forest to hunt, fish and collect jungle produce. These are stated in the following testimonies of the following witnesses:

(a) PW7, in para 7 of WS-PW7;

(b) PW10, in para 4(a) of WS-PW10;

(c) PW11, in para 4.1 of WS-PW11; and

(d) PW12, in para 5 of WS-PW12.

[30] The following witnesses who gave evidence of the above are presently practising the same traditional activities as passed down by their parents who are their 'immediate ancestor':

(a) PW3 in para 4 of exh WS-PW3 stated that he was a descendant of Aki Sarjan Ampieng, who was his great-grandfather. He testified as to the plaintiff's descendents' settlement, cultivation and movement in the Sungai Benat/Menat area. In para 10 of exh WS-PW3, he stated that the 'pioneering ancestors were shifting cultivators and farmers, hunters and jungle harvesters/collectors as such they have created many settlements, temuda land, orchards garden, tembawai within the area of Kampung Spaoh, Kampung Benat and Kampung Benat Ili'. The other witnesses from Kampung Benat/Menat, ie, namely PW6, PW13 gave evidence of similar lifestyles as practiced by their ancestors. PW3 also leads the same lifestyle up to today; and

(b) PW4 who is from Kampung Spaoh, testified that he was a great-grandchild of Aki Ugir. He also testified about the oral history and movement of his people in the Spaoh area. He inherited lands from his parents and has worked in the same lands as his parents did. The other witnesses from the said kampung, namely PW5, PW7, PW10, PW11 and PW12 also testified about their inheritance of lands from their parents and are presently working as farmers in those lands. In support, identity cards of Rubber Holdings which were variously issued to their grandparents, parents or in-laws were produced as evidence. Other contemporaneous documents relating to governmental agricultural schemes were also produced, such as rubber planting schemes, acceptance letters and coconut planting schemes.

[31] The presence of old longhouse sites or tembawai inside or near the disputed area claimed by the plaintiffs and/or how near is the present longhouse site from the area is pertinent. This is to determine whether the disputed area is within reasonable reach of the plaintiffs and their ancestors, viz 'within the useful reach of the folks' as per Ian Chin J. This is a measurement by time and space. The historian AJN Richard, have recorded the Iban tradition of half a day's journey. The old longhouse sites of the plaintiffs are at places named Nap, Menat/Benat, Sebemban, Tajau and Bukit Anggat. The sacred sites of the plaintiffs are the ones stated in para 9 of WS-PW3 and para 10 of WS-PW4.

[17] The learned High Court judge then proceeded to scrutinize the testimony of the witnesses in detail and concluded that the plaintiffs had established native customary rights including *pemakai menoa* and *pulau galau* over the entire disputed area.

[18] We find no reason to disturb this finding of fact. The evidence of the large cultivation mosaic measuring 300 hectares in the middle of Map 'M' and the other evidence of traditional activity in and around settlements in the area of interest were carefully considered by the learned High Court judge. His Lordship directed himself on the principles of ascertaining the existence of *pemakai menoa* that were expounded in the landmark case of *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769 by Ian Chin J. The traditional activity included not only agriculture but also hunting and foraging of nearby forest for food and other necessities. There was also evidence of old longhouse sites and burial grounds which proved historical occupation in the larger area beyond the confines of the present-day settlements. Furthermore, the High Court accepted the evidence of the witnesses and their narration of the oral history of their ancestors who had settled in the area. We also note that this finding of fact by the High Court was not overturned by the previous panel of the Court of Appeal although the issue was not specifically discussed. For all the above reasons, we find no merit in the submission of counsel for the fourth to sixth defendants that the plaintiffs failed to prove *pemakai menoa*. We affirm the finding of the High Court that the plaintiffs proved the existence of *pemakai menoa* in the area of interest in Map 'M'.

EXTENT OF *PEMAKAI MENOA*

[19] It must be recalled that the direction of the Federal Court when remitting the appeal was for the Court of Appeal to decide the location of the *pemakai menoa* and the extent of it under s 6A of the Sarawak Land Code (Cap 81). Notwithstanding that direction, in the written submissions, counsel for the plaintiffs approached the issue on the basis that the plaintiffs should be compensated for the loss of the entire area of interest in Map 'M' as found by the High Court. However, during oral argument, an apparent concession was made by counsel for the plaintiffs that the size of the *pemakai menoa* to be taken into account for purpose of compensation should be 1,000 hectares. This is the larger area of NDT under s 6A.

[20] On the other hand, counsel for the fourth to sixth defendants made the argument that even if the plaintiffs had proved *pemakai menoa*, they cannot claim either 500 hectares or 1,000 hectares. The reasons of counsel for the fourth to sixth defendants for this argument is as follows. Section 6A provides for a limited form of *pemakai menoa* where the area is restricted to 500 or 1,000

hectares. Furthermore, there is a statutory mechanism that must be availed. Therefore, the claimants must first apply to the Superintendent of Lands and Surveys to claim Native Territorial Domain under s 6A. In our respectful view, this is an invitation to review the decision of the apex court. We are not at liberty to examine the merits of this argument because the Federal Court has remitted this case to the Court of Appeal with a specific direction to determine the location and size of the *pemakai menoa* under s 6A. Therefore, the question of whether the *pemakai menoa* claim before the court is legally sustainable is not open for review anymore. That question has been elucidated by the Federal Court in this very appeal before it was sent down to us. In the premises, we will not indulge counsel for the fourth to sixth defendants on this issue.

[21] We noted earlier that the learned High Court judge had, after assessing all the evidence tendered in this case, found that the plaintiffs had proven *pemakai menoa* over the area of interest measuring 8,001 acres. In the premises, we rule that the plaintiffs are entitled to compensation based on the larger area under s 6A which is 1,000 hectares.

LOCATION OF TERRITORIAL DOMAIN

[22] To recapitulate, the Federal Court, after finding that *pemakai menoa* has been given statutory recognition under s 6A of the Sarawak Land Code (Cap 81), opined that the location of the area of 500 hectares or 1,000 hectares of pemakai in the area of interest of 8,001 hectares on Map 'M' would be relevant for the purpose of compensation.

[23] During argument before us, we pointed out that the High Court had made a finding that the entire area of interest of 8,001 hectares constituted the *pemakai menoa* of the plaintiffs. Furthermore, the plaintiffs are not seeking possession over any part of the area now but are only claiming compensation in accordance with the judgment of the High Court. Both counsel for the plaintiffs and the counsel for the fourth to sixth defendants agreed that it was not necessary to determine the location of the limited *pemakai menoa* of 500 hectares or 1,000 hectares as the claim now is for compensation only. In view of the agreement of the parties, the exact location of the area of *pemakai menoa* that the plaintiffs are entitled to in Map 'M' has become a non-issue. Compensation may be calculated in proportion to the area of *pemakai menoa* and *temuda* land that the plaintiffs are entitled to.

WHETHER THE *TEMUDA* AREA SHOULD BE 300 HECTARES OR 427 HECTARES

[24] Before the High Court, the plaintiffs claimed that their *temuda* land measured 427 hectares. However, the High Court noted that the cultivation

mosaic measured 300 hectares in identical locations on the maps of the experts from both sides. Consequently, the High Court found as a fact that the *temuda* land measured only 300 hectares. When the appeal came before the Court of Appeal previously, this finding was not disturbed. The Court of Appeal said as follows:

> [6] The size of the area of interest was 8,001 hectares and out of these 8,001 hectares it was agreed by both parties that the remaining areas in the area of interest, should be NCR land (*temuda*), consisting of approximately 300 hectares of cultivation mosaic as found in identical regions by both PW1 and DW1.

[25] The Federal Court did not disturb the finding of 300 hectares of *temuda* land either when it remitted the appeal to this panel on the issue of the location of the *pemakai menoa* and its extent. But we should think that the most important point to note in respect of the argument of the plaintiffs to revisit the finding of the High Court that the size of the *temuda* land is 427 hectares is this. The plaintiffs did not file a cross-appeal against the decision of the High Court that they are only entitled to 300 hectares. They were content with the decision of the High Court. In the premises, in our view, there is no live issue in respect of the size of the *temuda* land. It is 300 hectares as found by the High Court and affirmed by the Court of Appeal.

CONCLUSION

[26] In the premises, we unanimously order that the deputy registrar of the High Court to determine the value of the entire 8,001 hectares of land in Map 'M' and order compensation in proportion to the size of *pemakai menoa* of the plaintiffs' of 1,000 hectares and *temuda* land of 300 hectares. We award costs of RM15,000 to the plaintiffs.

Order accordingly.

Reported by Rafinie Ramli